Supreme Court, U.S.
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No. 1

In The
Supreme Court of the United States

JAVIER LUNA and ROSA MARIA GARCIA LUNA,
Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA, *et al.*
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

RALPH E. MCCARTHY
Counsel of Record
283 HEATHER COURT, 8A
TEMPLETON, CA 93465
(805) 434-9905

Attorney for Petitioners

December 3, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

In *Hoffman Plastic Compunds, Inc. v. NLRB*, 535 U.S. 137 (2002), (hereafter "*Hoffman*"), this Court declared the Immigration, Reform & Control Act of 1986, 8 U.S.C. § 1101 (hereafter "IRCA") pre-empted and precluded actions for employment benefits (specifically wage claims for "back-pay") in lower courts brought by "unauthorized aliens" (persons unlawfully present in the United States).

To avoid *Hoffman*, California, in 2002, enacted Cal. Lab. Code § 1171.5 (hereafter "Sec. 1171.5"), precluding inquiry or evidence of "immigration status" as "irrelevant" in California employment actions.

I

Whether an "unauthorized alien's" wage claim action for "back-pay" employment benefits, brought in reliance on Sec. 1171.5 declaring immigration status "irrelevant", is preempted and precluded for lack of subject matter jurisdiction, by the IRCA as interpreted in *Hoffman*, under the Supremacy, Due Process, and Equal Protection provisions of the federal and state constitutions.

II

Whether Sec. 1171.5, as applied by Respondent Superior Court to sanction and prohibit testimony of Petitioner employers for asserting the privilege against self-incrimination to forestall criminal prosecutions under IRCA, was

not only preempted and precluded under the IRCA and *Hoffman*, but was an act in violation of the Fifth Amendment, and Due Process provisions of the federal and state constitutions.

RULE 14.1(b) STATEMENT

Javier Luna, *Petitioner*

Rosa Marcia Garcia Luna, *Petitioner*

Ventura County Superior Court, *Respondent*

Hon. Vincent J. O'Neill, *Respondent*

Francisca Ortega Rodriguez, *Real Party in Interest*

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INTRODUCTORY PRAYER

Petitioners Javier A. Luna and Rosa Maria Garcia Luna, husband and wife, naturalized Mexican-American citizens, respectfully pray and request that a writ of *certiorari* be granted to review the judgment (App. B, Judgment on Verdict, pg. 7a) of the Respondent, Superior Court of California, County of Ventura (hereafter "Superior Court"), entered September 1, 2006, in *Rodriguez v. Luna*, No. 239129, and its Appellate Department opinion and order affirming, entered on April 10, 2007 (App. A, Opinion & Judgment, Appellate Dept., pg. 1a).

OPINIONS BELOW

On January 30, 2006, the California Labor Commission, in a wage loss "back pay" claim, brought by an "unauthorized alien," Francisca Ortega Rodriguez, Real Party in Interest, (hereafter "Rodriguez"), awarded Rodriguez $20,132, her full wage loss "back-pay" claim, against Petitioners Javier and Rosa Marie Garcia Luna (hereafter "Lunas") (App. C, Order, Decision or Award, pg. 10a). On appeal, under Cal. Lab. Code § 98.2, to the Superior Court for a *de novo* jury trial,[1] which was assigned to Honorable Vincent O'Neill, Judge, respondent herein, who denied

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[1] Section 98.2 provides for appeal to the Superior Court of a Labor Commissioner's decision. "Although denoted an 'appeal,' unlike a conventional appeal in a civil action, hearing under [Section 98.2] is de novo . . . a new trial . . . . The decision of the [Labor Commissioner] is entitled to no weight . . . truly a trial anew. . . ." *Sampson v. Parking Service 2000 Com, Inc.*, 117 Cal. App. 4th 212, 219-20 (2004).

the Lunas' pre-trial motion to dismiss for lack of subject matter jurisdiction on federal preemption and constitutional grounds, and proceeded to jury trial, resulting in his entering judgment on the Jury Verdict, without opinion, on September 1, 2006 (App. B, pg. 7a)

The appellate department of the Superior Court entered its Opinion and Order affirming the trial court on April 10, 2007 (App. A, pg. 1a), and thereafter denied rehearing on June 27, 2007 (App. D, Order Denying Rehearing, pg. 18a), which is the only formal written opinion filed in this matter.

JURISDICTION

The California Supreme Court denied a Petition for Certiorari (discretionary review) without opinion on September 4, 2007, and transferred (App. F., Order, Supreme Court, pg. 22a) for dismissal to the California Court of Appeal, Second Appellate District, Division 6, which entered dismissal, without opinion, on September 20, 2007. (App. E, DCA Order Dismissal, pg. 12a)

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

Article 1, Section 8 of the United States Constitution provides in relevant part:

> The Congress shall have power . . . To establish a uniform Rule of Naturalization . . . .

Article VI of the United States Constitution provides in relevant part:

> This Constitution, and the Laws of the United States . . . Shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitutions or Laws of any state to the Contrary notwithstanding.

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person...shall be compelled in any criminal case to be a witness against himself. nor be deprived of life, liberty, or property, without due process of law, . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law, nor to deny to any person within its jurisdiction the equal protection of the laws.

B. California Constitutional Provisions

Article 1, Section 7(a) of the California Constitution provides in relevant part:

> A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided . . . nothing (which) exceed those imposed by the Equal Protection Clause of the . . . Fourteenth Amendment to the United States Constitution.

Article 1, Section 15 of the California Constitution provides in relevant part:

> . . . Persons may not . . . be compelled in a criminal cause to be a witness against themselves.

C. Federal Statutory Provisions

The Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a, Unlawful employment of Aliens, provides in relevant part:

> (a)(1) . . . It is unlawful for a person . . .
>
> > (A) to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) . . .) with respect to such employment, or
> >
> > (B)(1) to hire for employment in the use a contract...to obtain the labor of an alien..knowing ..the alien is an unauthorized alien..shall be considered to have..violations of ..(1)(A).

* * *

(b) Employment verification system. The requirements . . . are, in the case of a person . . . hiring . . . an individual for employment in the United States, the requirements specified in specified..in the following three paragraphs: [(1), (2), (3): provide detailed documentation verification procedures required of employers].

* * *

(f)(1) Criminal penalty. Any person or entity which engages in a pattern or practice of violations of subsection (1)(A) . . . of this section shall be fined not more than $3000 for each unauthorized alien. . . , imprisoned for not more than six months . . . .

* * *

(h)(2) Preemption. The provisions of this section preempt any State or local law imposing civil or criminal sanctions . . . upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

(h)(3) Definition of unauthorized alien. As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.

28 U.S.C. § 1257(a) provides in relevant part:

> Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed in the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . .

D. California Statutes.

Cal. Evid. Code § 940 provides in relevant part:

> (To the extent of federal and state constitutions) . . . a person has a privilege to refuse to disclose any matter that may tend to incriminate him.

Cal. Lab. Code § 98.2(a) provides in relevant part:

> . . . parties may seek review by filing..appeal to the Superior court, where the appeal shall be heard de novo.

2002 Cal. Stat. ch 1071 (§§ 1, 2, and 4) (S.B. 1818) added identical provisions to Cal. Civ. Code § 3339, Cal. Lab. Code § 1171.5, and Cal. Gov't Code § 7285, each as set forth in relevant part as follows:

Cal. Lab. Code § 1171.5

* * *

> (a) All protections, rights, and remedies available under state law, except any

reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.

(b) For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.

* * *

STATEMENT OF THE CASE

1. Procedural History

On September 19, 2005, Rodriguez, an "unauthorized alien" even though paid her agreed weekly rate in full to her date of termination on September 26, 2004, claiming she was an employee, filed a wage claim for "back-pay" wages[2] for the period

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[2] Back-pay is payment for work done in the past. For example, Webster's Third New International Dictionary, 1995 gives the second definition of the adjective "back pay" as "overdue," or "in arrears" or "due for services performed prior to the latest pay

from September 22, 2002, to January 31, 2004, against the Lunas.

On January 30, 2006, the California Labor Commissioner entered its Order, Decision or Award, awarding Rodriguez her full claim of "back-pay" wages of $20,131 against the Lunas. (App. C, pg. 10a.) On appeal to the Superior Court of California, County of Ventura, in *Javier A. Luna and Rosa Marie Garcia Luna v. Francisca Ortega Rodriguez*, No. 239129, the court set jury trial *de novo*, to commence on August 28, 2006, as required by Cal. Lab. Code § 98.2, governing the appeal.

The IRCA preemption and preclusion issue, the first Question Presented for Review presented in this Petition, at page i, *supra*, was clearly preserved on the record when, on August 28, 2006, Luna filed a pre trial Motion in Limine to exclude all evidence and to dismiss for "lack of subject matter jurisdiction" on the ground of federal preemption of state "back-pay" wage actions by "unauthorized aliens," under the IRCA, as interpreted in *Hoffman*, as in violation of the Supremacy and Due Process clauses of the U.S. Const. art. I, § 6, and the Fifth and Fourteenth Amendments to the United States Constitution, (App. J., Motion in Limine, pg. 28a), which were denied without prejudice and were renewed August 11, 2007, and again on the

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period" . . . a retroactive increase results in (back) wages for workers. "Back-pay" and "lost wages" are nearly identical, *Safeharbor Employer Services I, Inc. v. Velazquez*, 860 So. 2d 984 (Fla. Dist. Ct. App. 2003), but Workers Compensation is distinct from "back-pay." *Id.*

first day of trial, and to guarantee a clear record of presentation and denial, once more orally in full to the court, on August 28, 2006, the morning of the trial (App. L, Oral Motion to Dismiss, RT p. 11, l. 22 to p. 19, l. 11, pg. 42a), together with and including an offer of proof of unauthorized alien (illegal immigrant) status of Rodriguez (App. N., Offer of Proof, RT p. 68, ls. 4-18, and p. 129, ls. 2-15, pg. 55a), all denied, as well as denial of the Lunas' motion for hearing *in camera* regarding Rodriguez's immigration status, and, instead, granted Rodriguez's motion to exclude evidence of immigration status of Rodriguez. (App. M, Order to Exclude, RT p. 18, l. 19 to p. 19, l. 11, pg. 53a.)

The evidence preclusion/Fifth Amendment issue, the second Question Presented for Review, presented in this Petition at page i, *supra*, is preserved by reference to the evidence preclusion and monetary sanction order entered August 28, 2006 (App. K, Order Evidence Exclusion Sanction, pg. 39a) and stated orally from the Bench on August 22, 2005. (App. O, Sanction Order, RT p. 9, ls. 1-23.)

During pre-trial discovery, at their deposition, the Lunas, on advice of counsel, asserted their Fifth Amendment right to refuse to answer questions which might possibly lead to evidence tending to incriminate them, under IRCA § 1324a(a)10, making it a criminal offence for any "person to employ an alien, knowing the alien is an unauthorized alien." On subsequent motion to compel by Rodriguez, Judge Vincent O'Neill stated:

> . . . if there is any Fifth Amendment privilege that's applicable, that would not preclude a consequence of asserting it in this case and that consequence is going to be suppression of the defendants testimony in any and all phases, including rebuttal, at the trial . . . in other words, the defense will be not allowed to call them as witnesses for any reason.

(App. O, RT p. 9, ls. 16-23, pg. 60a.)

Judge O'Neill, then in addition, imposed monetary sanctions on both defendants and their counsel "for abuse of discovery" (App. K at pg. 41a).

The Court (Judge O'Neill) then proceeded to jury trial, precluding, any mention of immigration status, and any testimony of defendants, which of course, resulted in a Jury Verdict awarding Rodriguez significant retroactive "back-pay" increases, to the Labor Commission award.

On September 1, 2006, the Court (Judge O'Neill) entered Judgment on the Verdict (App. B., Judgment on Verdict, pg. 7a) and subsequently on December 8, 2006, the Court awarded $27,927 to Rodriguez's counsel, as attorney fees (App. I. Order, pg. 27a), and still not content, recently, October 17, 2006, awarded that counsel another $10,000 attorney fees (App. H, Order, pg. 25a) for the appellate department "appeal," all over strenuous jurisdictional objections on the basis of preemption and preclusion and the Fifth Amendment, as raised in this Petition.

2. Questions Presented were Raised, Denied, and Preserved in all State Courts.

The two Questions Presented were asserted, not only at the trial, and in the appellate department of the Superior Court, but in the Petition for Review (Discretionary) filed in the California Court of Appeal, Second Appellate District, Division 6, summarily denied without opinion on June 27, 2007 (App. D, DCA denial, pg. 19a), and in a Petition for Certiorari, filed in the California Supreme Court, on August 27, 2007, which was denied, and transferred, without opinion, back to the Court of Appeal, Second Appellate District, Division 6, for dismissal (App. F, Order, Cal. Supreme Court, pg. 23a), where order dismissing the petition was entered in that Court on September 20, 2007. (App. E, DCA dismissal, pg.21a.)

This Petition for Certiorari, was timely filed with this Court, within 90 days of September 20, 2007.

REASONS FOR GRANTING THE WRIT

A. California's Legislature and Courts have Decided the Important Question of Federal Preemption of Actions by "Unauthorized Aliens", in Direct Conflict with this Court's Decision in *Hoffman* Prohibiting such Actions, Pursuant to the IRCA, and the Supremacy, Due Process and Fifth Amendment Provisions of the United States Constitution.

1. Constitutional Background

The need for uniform regulation of immigration over the states, is recognized in Article 1, Section 8 of the United States Constitution, delegating to Congress the exclusive power ". . . to establish a uniform Rule of Naturalization", which, under the Supremacy Clause, Article VI, gave Congress an exclusive federal regulatory power over immigration, naturalization and deportations, as continuously recognized by the Supreme Court. *Hines v. Davidowitz*, 312 U.S. 52 (1941) (State Act pre empted).

Yet, when exercising that power over persons unlawfully entering and present in the United States, "unauthorized aliens" – especially in the area of employment – required recognition that even unauthorized aliens were "persons" guaranteed due process and equal protection under the Fourteenth Amendment to the United States Constitution. In *Taskahashi v. Fish and Game Comm'n*, 334 U.S. 410, 419 (1946), the Supreme Court held such persons were protected under the Civil Rights Act (42 U.S.C. § 1981)

and guaranteed "due process" under the Fourteenth Amendment to the U.S. Constitution. *See also Plyler v. Doe*, 457 U.S. 202, 210 (1982) (illegal aliens guaranteed due process by Fifth and Fourteenth Amendments). As a result, in 1952 Congress enacted the Immigration and Naturalization Act, 8 U.S.C. §§ 1101-1537 (INA), recognized as a "comprehensive federal statutory scheme for the regulation of immigration and naturalization". *DeCanas v. Bica*, 424 U.S. 351, 353 (1976). In *DeCanas,* in a classic "omission equals confirmation" reasoning, the Court upheld a state immigration regulation, stating, "Absent Congressional intent to preempt the field of immigration", a California law prohibiting employers from hiring illegal aliens to prevent adverse effect on legal resident workers was "facially" constitutional.

Apparently the INA, as noted in *DeCana*, was not sufficient, although its "negative implication" rule of construction prevailed. In 1984, in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984), the Court noted the INA did not (at least not expressly) make it "unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization," or for "an alien to accept employment after entering this country illegally."

Congress remedied the omission in 1986, two years later, when it amended the INA by enacting the IRCA, described as a "comprehensive scheme prohibiting the employment of illegal aliens in the United States, forcefully making combating the employment of illegal aliens central to the policy of immigration law."

2. The Immigration Reform and Control Act of 1986 (IRCA)

In enacting the IRCA, Congress left no doubt, and no exceptions, explicitly stating in 8 U.S.C. § 1324a(a)(1):

> It is unlawful for a person, (A) to hire for employment in the United States, an alien knowing the alien is an unauthorized alien with respect to such employment . . .

and defined "unauthorized alien" in 1324a(h)(3) as an alien who at the time of hiring, was neither

> . . . an alien lawfully admitted for permanent residence, or , . . . authorized to be so employed by this Act or by the Attorney General.

To ensure against such hiring, Congress enacted an elaborate verification system, requiring *employers* to verify the legal "status" of persons hired (1324a(b)), to be enforced by *employers*, and provided that employers who fail to check their worker's immigration status, or who fail to keep eligibility records, face civil fines (1324a(e)(4)(A)) and criminal penalties of imprisonment and fines, to be imposed on any employer "*engaged . . . in a pattern or practice of violating section (1)(A),*" (1324a(f)).

Interestingly, it was not until 1990, four years later, that the IRCA was itself amended to provide for penalties and sanctions to be imposed directly on *unauthorized alien workers* who sought employment in the United States, but made these new sanctions

applicable only to aliens who knowingly or recklessly used false documentation to obtain employment (1324 (a)(f)).

To eliminate any doubt of intent to keep immigration regulation an *exclusive federal power*, although seldom noticed,[3] Congress included an express provision for preemption in 1324a(h)(2), as follows:

> The provisions of this section preempt any State or local law imposing civil or criminal sanctions –upon those who employ, or recruit or refer for a fee for employment . . . of unauthorized aliens.

Although concerned primarily with employment, the IRCA may work as a repeal of the Civil Rights Act, § 1981, at least to the extent § 1981 allows unauthorized workers to enter into employment contracts.

3. The IRCA as Interpreted in *Hoffman*.

Significantly, it was not the preemptive effect of the IRCA on state law that first required judicial attention. Rather, it was the potential for conflict between IRCA, and other co-equal federal laws,

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[3] One state court asserted, erroneously, the IRCA "did *not* contain an express preemption clause," contending ". . . the omission justified a determination that Congress had left room for states to act." *Safeharbor Employer Services I, Inc. v. Velazquez*, 860 So. 2d 984 (Fla. Dist. Ct. App. 2003) [a striking demonstration of the fallacious "omission/confirmation" rule of construction discussed above].

specifically federal labor laws. In *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the Supreme Court held specifically, that the NLRB was prohibited by the IRCA from awarding an undocumented worker "back-pay" to remedy an unlawful discharge. Chief Justice Rehnquist, authoring the opinion, explained the holding, stating;

> With respect to back-pay, the employee must be deemed unavailable for work, and the accrual of back-pay therefore tolled during any period when they were not lawfully entitled to be present and employed in the United States.

In the present petition Rodriguez was an unauthorized and undocumented alien worker, who was awarded back-pay for a period in which she was unavailable for work, by reason of her continuing status as an "unauthorized alien." The specific holding regarding "back-pay" in *Hoffman* would seem to require the Superior Court award be declared jurisdictionally invalid, and set aside.

More importantly, the Supreme Court did not limit its holdings to "back-pay" determinations, indicating "*isolated sentences or persuasive dicta from prior decisions regarding 'back-pay'" did not control*. Chief Justice Rehnquist extended the holding beyond "back-pay" observing:

> We think the question presented here better analyzed through a wider lens, focused as it must be on a legal landscape now significantly changed.

Instead the Court turned attention to the underlying policies of the IRCA, as "combating the employment of illegal aliens central to the policy of immigration law," and now noted *any* actions by unauthorized aliens in the employment field were not only preempted, but completely precluded by the IRCA, explaining:

> Under the IRCA regime, it is impossible for an undocumented worker to obtain employment in the United States, without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contraction of its IRCA obligations.

Id. at 429.

This latter broader holding affected both co-equal federal statutes but was upheld, primarily in state actions under the supremacy clause.

In *Sanango v. 200 East 16th Street Housing Corp.*, 788 N.Y.S.2d 314 (App. Div. 2004), the Court, following *Hoffman*, held a state law preempted, stating:

> A State law, which by virtue of the Supremacy Clause (U.S. Const. art. VI, § 2) is subordinate to any federal policy, must give way to IRCA as well, since a state law that so frustrates the accomplishment of federal objective is

> preempted by virtue of the Supremacy Clause,- it follows from *Hoffman*, that New York law to the extent it would permit plaintiff to recover the wages he would have earned illegally in the United States, is pre-empted by the IRCA.

and more recently, in federal court, in *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), following *Hoffman*, declared a municipal ordinance preempted and unlawful under the Supremacy Clause, which "invalidates state laws that interferes with or are contrary to federal law".

However, most courts have failed to recognize *Hoffman's* broader and more basic interpretation of the IRCA holding *any* action in the employment field, by an unauthorized alien, whether for wages or other benefits, is preempted and precluded. Failure to recognize this broader holding has largely been the cause for misapplication in most courts, limiting *Hoffman* to "back pay" actions, by use of the "isolated ed sentences or persuasive dicta from prior decisions regarding 'back-pay'" expressly condemned in *Hoffman*.

4. California enacted Labor Code § 1171.5 To Escape Preemption by the Device of Declaring Immigration Status "Irrelevant", and Prohibiting Evidence thereof, in Direct Defiance of the IRCA, as Interpreted in *Hoffman*.

Within five months of the decision in *Hoffman*, California enacted Labor Code § 1171.5[4], escaping the *Hoffman* rulings, by the device of declaring immigration status "irrelevant" and in proceedings to enforce state labor laws, exclude and prohibit evidence, and even inquiry into a persons immigration status, thereby making compliance with federal preemption impossible. As explained in *Farmers Brothers Coffee v. Wk. Comp. App. Bd.*, 13 Cal. App. 3d 533 (Ct. App. 2005):

> Section 1171.5, subdivision (b), avoids conflict with *Hoffman's* back-pay prohibition by making an exception to the exclusion of evidence of the employees immigration status, 'where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law. . . . Under existing law, back pay is not recoverable by an employee who would not be rehired regardless of any employer misconduct. . . .Thus, where reinstatement is prohibited by federal law, section 1171.5 would also prohibit back-pay,

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[4] Identical provisions in Civil Code § 2338, and Government Code § 7265.

> which was the intent of the Legislature in passing section 1171.5 and related statutes.(*See Sen. Com. on Labor, Rep. on Sen. Bill No 1818, as amended May 14, 2002.).*

Of course, the Superior Court below relied on Section 1171.5, as have all California Courts since it was decided, to prevent preemption by precluding evidence or proof of immigration status.

And as shown, the California Courts strictly limited federal preemption to "back-pay" cases, completely ignoring *Hoffman* had expanded federal preemption to *all* employment benefits, not just "back-pay". In *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp 2d 1056 (N.D. Cal. 2002), excepted actions seeking wages for work "performed", and tort, and, as noted in *Farmers, supra*, workmen's compensation. To escape the problem of inclusion of future lost wages, in violation of *Hoffman*, the Courts had distinguished "lost wages" from workers compensation and tort recovery.

More troublesome has been the tendency of California Courts to award or withhold benefits as punishment for the other parties conduct, even where the award to an "unauthorized alien", would not otherwise be possible. In *Hermosillo v. Wk. Comp. App. Bd.*, 70 Cal. Comp. Cases 632, 2005 Cal. Wk. Comp. LEXIS 67 (2005)), an unauthorized alien was nevertheless awarded benefits, as punishment of the employer for his violations, and in *Amorijon v. Hinse*, (Cal. App. 2004) 2005 WL 224, 225 (2003), the employee was punished with no remedy where he presented false papers. The alleged rational for using punishment as retribution to make awards to

unauthorized aliens (two wrongs make a right) contention was explained in *Hermosillo v. Wk. Com. App. Bd.*, 70 Cal. Comp Cases 632, 2005 Cal. Wk. Comp LEXIS 67 (CA 4th 2005) as follows:

> . . . employers who traffic in the hiring of illegal aliens should not escape the consequences of providing all benefits, including vocational rehabilitation, to which workers are entitled when they are injured..

Finally California has completed total subversion of the IRCA and *Hoffman*. In *Reyes v. Van Elk, Ltd.*, 148 Cal. App. 4th 604 (2007), *review denied* (June 13, 2007), awarding prevailing wages as minimum wages to an unauthorized alien, the Court declared point blank that the:

> IRCA did not preempt California statutes declaring immigration status irrelevant to claims under labor, employment, civil rights and employee housing laws

in effect, holding Labor Code § 1171.5, ***preempted the IRCA*** in regulating immigration, completely reversing the Supremacy Clause, Art. 1, § 6 of the United States Constitution.

B. The Courts are in Disarray, Confusion and Conflict in Interpreting and Applying the IRCA's preemption and preclusion rules, as interpreted in *Hoffman*. Only This Court Can Remedy the Confusion.

Although *Hoffman's* clear extension of preemption bars to all employment case, not limited to only "back-pay," compliance with this extension would have the result of eliminating regulation of unauthorized aliens by state and local governments. The unacceptability of this result to state and local governments, usually revealed by questioning the "reasoning" of the Supreme Court, which implies that, contrary to *Hoffman*, all actions other than for back-pay, by unauthorized aliens in the employment field, were open for immigration regulation, by federal agencies, state and local governments.

Failure to enforce the extension of preemption, as held in *Hoffman*, has generated multiples of diverse decisions, resulting in confusion, conflict and disarray in the lower courts. As, erroneously concluded in *Cano v.Mallory Mgmt.*, 195 Misc. 2d 666, 760 N.Y.S.2d 816 (Sup. Ct. 2003) collecting cases:

> every case citing *Hoffman* since it was rendered has either distinguished itself from it, or has limited it greatly. . . .

Whether failure to follow *Hoffman's* broader rule, or the IRCA statutory language did not resolve the question clearly enough, the flood of decisions *post Hoffman*, has resulted in complete disarray, confusion and conflict, completely defeating any possibility of

achieving uniformity in this area of immigration, leaving each state free to "go its own way."

In particular, lower courts have had difficulty determining applicability of *Hoffman* to other statutes, and the application case law is in conflict with both broad and narrow readings of *Hoffman*.

One of the initial distinctions used to escape *Hoffman*, was based on inapplicability to actions in which the work had already "been performed". As utilized in *Singh v. Jutla & C.C. & R's Oil, Inc.*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002), and *Zeng v. Donna Karan Int'l, Inc.*, 207 F. Supp.2d 191, 192 (S.D.N.Y. 2002), allowing even a "back pay" award, the Court noted a "distinction between an award for money already earned, but unpaid, and wages that would have been earned, but for immigration status restricting any future employment."

Of course neither the IRCA nor *Hoffman*, except such cases, even discusses whether or not work had been performed.

In *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d. 219 (2d Cir. 2006), holding a back pay or lost earning award conflicts with federal immigration law only where the violation was committed by the employee, not by the employer.

Next, most, but not all, courts except workmen's compensation from federal preemption. *Compare Farmers Brothers Coffee v. Wk. Comp. App. Bd.*, 133 Cal. App. 4th 533 (Ct. App. 2005); *Sanchez Eagle Alloy Inc.*, 658 N.W.2d 510 (Mich. Ct. App. 2003) and *Correa*

v. Waymouth Farms, Inc., 664 N.W.2d 324 (Minn. 2003) precluding workmen's compensation to undocumented workers.

While the courts have historically allowed tort actions under the civil rights acts, since *Hoffman* courts have restricted the amount that undocumented immigrants injured at work can recover in personal injury tort cases. In fact, cases prior to *Hoffman* have reached conflicting results, including *Rodriguez v. Kline*, 186 Cal. App. 3d 1145 (1986) (undocumented plaintiff can only recover lost U.S. earnings and has burden of proof that he has taken steps to correct his "deportable condition"), and *Hernandez v. M/V Rajaan*, 848 F.2d 498 (5th Cir. 1988) (no lost U.S. earnings).

Post-Hoffman, the confusions persisted. In *Veliz v. Rental Service Corp USA, Inc.*, 313 F. Supp. 2d 1317 (M.D. Fla. 2003), an undocumented worker's heirs brought a negligence action for death in a forklift accident at work. The Florida district court ruled that his estate was not entitled to an award of lost wages because it would represent earnings in conflict with IRCA policy. This distinction has resulted in the further problems of, where lost wages are being awarded in a tort case, regardless of *Hoffman*, under which country, the United States, or the worker's native country is used to establish the amount of lost wages. *Compare Sanango v. 200 E. 16th Street Housing Corp.*, 15 A.D.3d 36, 788 N.Y.S.2d 314 (App. Div. 2004) (holding IRCA preempted undocumented worker's right to sue under the state labor law, for lost United States earnings), with *Majlinger v. Cassino Contracting Corp.*, 25 A.D.3d 14, 802 N.Y.S.2d 56

(App. Div. 2005) holding that compensating injured undocumented worker for lost United State earnings under that state law does not conflict with IRCA, *but see Melendres v. Soales*, 306 N.W.2d 399 (Mich. Ct. App. 1981), holding country of origin for lost earnings.

The tort, future earnings conflict, has in turn accelerated requests for discovery of immigration status, requiring exposure of the undocumented status of the alien. In *Hernandez v. Paicius*, 109 Cal. App. 4th 452 (Ct. App. 2003), the California court decided on appeal that compelled disclosure of plaintiff's immigration status by a lower court judge was in error because immigration status, under California statutes, was "irrelevant".

Most of the foregoing cases regarding "lost wages" were reviewed in the New Hampshire Supreme Court, which decided that "a plaintiff's immigration status is relevant to the amount of damages, which allows inquiries into immigration status. *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994 (N.H. 2005).

Perhaps the most promient contrary example of arguments being made by employers for immigration related discovery is *Rivera v. NIBCO, Inc.*, 364 F.3d 1067 (9th Cir 2004), *cert. denied* 125 S. Ct. 1603 (2005), holding *Hoffman* does not require court-ordered discovery of plaintiffs' immigration status in California.

The employers argue IRCA preemption requires discovery of immigration status, not only for IRCA, but that status affects remedies, especially in tort lost future earnings awards. Employees contend that

attempts to discover are retaliatory in nature used by employers to expose status, leading to deportation.

While immigration status may sometimes be proved by admission of a certificate of nonexistence of record (CNR), a document establishing that an alien had not been granted permission to enter the country, has been held admissible over objections it is a violation of the Sixth Amendment's Confrontation Clause. *See United States v. Cervantes-Flores*, 421 F.3d 825, 834 (9th Cir. 2005).

One court, *EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404 (E.D.N.Y. 2004), suggested a resort to Fed. R. Civ. P. 26(b)(2) and 26(c) requiring balancing of both interests, and pretrial hearing before a judge to determine discovery, and then submit or not to the jury accordingly, including ability of the judge to preclude the discovery because, in that case, the "defendant cannot ignore immigration laws at time of hiring, but insist upon their enforcement when employees complain", resorting to the punishment/reward concept in immigration law.

Although the specific holding in *Hoffman* was the NLRB was prohibited by the IRCA from awarding an undocumented worker "back-pay", to remedy an unlawful discharge, the premption and preclusion was extended far beyond "back-pay" to bar all actions by unauthorized aliens in the employment field. The reasoning supporting the extension to all employment actions, as explained by Chief Justice Rehnquist, at S. Ct. 1283, as follows:

> Under the IRCA regime, it is impossible for an undocumented worker to obtain employment in the United State without some party directly contravening explicit congressional policies.
>
> Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.

Although seemingly clear enough, the reasoning opened debate in the lower courts, as to application to remedies other than back pay. The simple answer is obvious: the ruling extended to all remedies provided unauthorized aliens in the field of employment. That answer of course eliminated any regulation whatever by states and local governments over employment of unauthorized aliens. The result forecast court distinctions of *Hoffman*, in the lower courts.

In the Superior Court, the Lunas requested the Court decide immigration status in an *in camera* hearing, which was denied. In the most recent decision, the procedure was endorsed in *Reyes v. Van Elk, Ltd.*, 148 Cal. App. 4th 604 (2007), *review denied* (June 13, 2007), providing for determination of immigration status, without prejudice to either side, by holding a pre trial *in camera* conference with the trial judge, to determine immigration status, and then, if applicable, submitting the immigration status information to the jury for consideration on the issue of the likelihood of deportation as a factor affecting recovery of lost future wages. (If deported they may

decide he is not entitled to any future wages, for those would necessarily be employment wages.)

The Lunas requested this procedure in the Superior Court, which as shown, refused the request, precluding any inquiry into immigration status, period.

However the *Reyes* procedure also evades *Hoffman's* central holding, that an unauthorized alien has no right of access to the Courts whatever in the employment field, which in turn justifies dismissal of the action in its entirety.

The discovery issue are further complicated by privilege protections for the employee in the labor statutes precluding evidence as in Sec. 1171.5, as "irrelevant", without extending "equal protection" to the employer, clearly at least his "right not to testify" as provided in the Fifth and Fourteenth Amendments to the United States Constitution. Especially where both employer and employeee are subject to criminal prosecution for violations of the IRCA.

The latest attempt of the INS to discover unauthorized aliens is the DHS's "No-Match" letter.

Under that procedure, when the employer calls, as required, to verify accuracy of social security number documents delivered by the worker, and finds "no match"of numbers, the DHS sends the employer a Social Security packet (letter) that includes or references the DHS security guidance letter, warning the employer that continued employment of the alien may be a violation of the criminal portions of the IRCA, and the "no-match" letter may be shown in

evidence in any subsequent prosecution of the employer for continuing the employment. [Why similar letters are not sent to the workers–"Equal Protection"–has not been ascertained.]

However, even this procedure is likely to be permanently stopped by the Courts. As of October 15, 2007, the "no-match" letters from DHS have been restrained by order of the United States District Court, Northern District of California, in AFL-CIO et al v. Chertoff, Secretary of DHS, et al., N.D. Cal. Case No.07-4472.

Perhaps the most troublesome had been the tendency of Courts to use extension, or not, of benefits to an unauthorized alien, or denying benefits as punishment of the other party. *See, e.g., Hermosillo v. Wk. Comp. App. Bd.*, 70 Cal. Comp. Cases 632 (CA 4th 2005), awarding illegal benefits as punishment of employer, and *Amorijon v. Hinse*, Cal. App. 2004, 2005 WL 224, 225 (2003), holding "no remedy for employee where he presented false papers." State and local legislative enactments which interfere with the federal regulation of immigration, as in California Labor Code § 1171.5, completely subvert the IRCA, causing now, what is almost a national emergency, in regulation of immigration.

The conflict, uncertainty, and disarray would have been avoided by following the simple direction of the *Hoffman* extension of preemption of all employment benefit actions by unauthorized aliens.

But the lower courts have almost subverted the rule completely, let alone confuse the issue by the diverse conclusions, to the extent of uncertainty.

That uncertainty can only be cured by this Court,- revisiting *Hoffman*, to establish uniformity at last, pending further solutions by Congress, where they should be made, and not the courts.

C. California's Labor Code § 1171.5(b), When Applied to Prohibit Testimony and Punish an Employer who asserts the Fifth Amendment to Protect from Incrimination under the IRCA, Violated not only Preemption under the IRCA but the Due process and Privilege not to Testify Preserved in the Fifth and Fourteen Amendments to the United States Constitution.

As discussed earlier, the discovery of status and/or compliance of either the employee, or employer raises the problem of preclusion restrictions of discovery. The present petition presents both employer Fifth Amendment privilege, and unauthorized alien employee protection by preserved in Cal. Lab. Code § 1171.5, as decided in the Superior Court raised in the Superior Court and preserved for this Petition. (*Page 9 above*)

In the Superior Court, during pretrial discovery at their deposition, the Lunas, on advice of counsel, asserted their Fifth Amendment privilege to refuse to answer questions which might possibly lead to evidence tending to incriminate them, as employers,

under IRCA, § 1324a(a)(10), making it a criminal offence for any person "to employ an alien knowing the alien is an unauthorized alien".

The key word in the statute is "*knowing*". The term includes not only actual knowledge, but also facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition". CFR 274a1(1)(1). However "knowledge that an individual is unauthorized may not be inferred from his or her foreign appearance or accent." (CFR at(1)(2)).[5]

On subsequent motion to compel by Rodriguez, Judge Vincent O'Neill ruled (App. O, pg. 61a):

> . . . if there is any Fifth Amendment privilege that's applicable, that would not preclude a consequence of asserting it in this case, and that consequence is going to be suppression of the defendants testimony in any and all phases, including rebuttal, at the trial . . . . In other words, the defense will be not allowed to call them as witnesses for any reason.

Judge O'Neill, having previously denied a request for *in camera* hearing of evidence of Rodriguez immigration status as an "unauthorized alien", granted Rodriguez's motion to exclude all evidence or inquiry regarding her immigration status, as "irrelevant" under Labor Code § 1171.5.

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[5] It was not until the IRCA itself was amended in 1990, that Congress provided penalties to apply directly to employees.

In addition to the evidence preclusion sanctions Judge O'Neill imposed monetary sanctions against defendants and their counsel, holding the Fifth Amendment assertion, at their deposition was an "abuse of discovery".

Judge O'Neill had also indicated he felt the defendants had waived their constitutional rights[6] by testifying at the California Labor Commissioners hearing. At that time, they were unrepresented, and speaking only Spanish, they had to rely on translations. They certainly had no knowledge of Fifth Amendment privilege, nor is there any affirmative record showing "waiver" by them.

Moreover, the waiver, if there was one, was in the Labor Commission hearing, not in the *de novo* hearing in Superior Court could only have been at that level, and effective only in that proceeding. *People v. Lopez*, 110 Cal. App. 3d 1010 (Ct. App. 1980).

Additionally, the objections to subject matter jurisdiction is never waived. If the Court lacks jurisdiction on the last day of a proceedings as well as it did on the first day when one raised the jurisdictional question, its "kind of an atom bomb" and it has to be addressed.

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[6] The privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution, is preserved in California Constitution, art. 1, § 15, codified in Cal. Evid. Code § 940. Although the Constitutional provisions are facially limited to criminal proceedings, California has repeatedly held the privilege is equally applicable to civil proceedings, even discovery proceedings.

California has held that an order excluding essential evidence on their only cause of action (as in the Superior Court), denies constitutional due process of the right to testify, *Burton v. Santa Barbara Nat'l Bank*, 247 Cal. App. 2d 427, 432 (Ct. App. 1966), and again, in *National Auto Ins. Co. v. Frates*, 46 Cal. App. 2d 41 (1941) the California court held that denial of the right to testify equaled reversible error per se, reasoning such an order was "an improper denial of the right to a hearing, and to testify–in short a denial of due process under the Fourteenth Amendment. *See also Spector v. Superior Court of San Mateo County*, 55 Cal. 2d 839 (1961).

Instead of relying on supposed unverified unrecorded "waivers", could have proceeded by recognized procedures. As explained in *People v. Lucas*, 12 Cal. 4th 415, 454 (1995):

> When witnesses refuse to testify based on the privilege against self incriminate the trial court may compel the witness to answer only if it clearly appears to the court that the proposed testimony cannot possibly have a tendency to incriminate the witness; a witness may refuse to answer questions calling for potential links in the chain of evidence of guilty, as well as questions calling for clear admissions against penal interest.

It could hardly be asserted by reasonable persons, that in this case, the employers' assertion of the Fifth Amendment, especially with reference to any facts that might possibly be or lead to a violation of the IRCA

criminal statutes, and possible imprisonment, was an "abuse of discovery."

The Court could have granted immunity as provided in *Southwest Manor Conv. Home*, 227 NLRB n. (1977):

> If a party wishes to compel the testimony of someone who has invoked the Fifth Amendment privilege against self incrimination, the party must request the Board seek a grant of immunity for the witness under NLRB Ruling 4 102.31.

The easiest way to have resolved the discovery questions was to proceed with the requested *in camera* hearing pre-trial, which is the procedure authorized in California, as set forth in *Reyes v. Van Elk, supra*, leading to jury submission of both questions of immigration status, relevant to "lost wages", and relevant to employer violations justifying a punitive award even in cases by unauthorized aliens.

The punitive and improper discovery preclusion, of evidence relevant in determining IRCA preemption and preclusion, and imposition of punitive sanctions orders for assertion of right not to testify, were outrageous direct violations of not only preemption by IRCA, but clear violations of the protections of civil rights of due process under both the Fifth and Fourteenth Amendments to the US. Constitution.

The discovery and correspondingly privilege questions in proceedings involving employment of authorized aliens, as in the Superior Court, can only

be resolved, and made uniform by this Court. The present Petition for Certiorari presents an excellent opportunity for such resolutions.

D. The Importance of the Question

The Questions Presented in this Petition are of extreme national and world wide importance affecting millions of unauthorized aliens residing and employed in the United States, and their families. Citizens, however, overwhelmingly favor restrictions on the yearly flood of illegal immigrants and the services provided them by federal, state and local governments. *See* Bartlett and Steele, *Who Left the Door Open?*, Time, Sept. 29, 2004 at 51.

The Constitutional reservation of power to "establish a uniform Rule of Naturalization" (Art 1, § 8), pursuant to which Congress enacted the Immigration and Naturalization Act (INA), as amended by passage of the *Immigration Reform & Control Act of 1986* (IRCA) is the latest controlling legislative exercise of the power by Congress to seek uniformity and control of, and/or preclusion of, actions by unauthorized aliens pursuing employment and its benefits, in the United States.

However, due to a combination of poor legislative draftsmanship, and the confusion and legal ambiguity following *Hoffman*, the IRCA has proven wholly ineffective to accomplish the legislative purpose.

When Congress enacted the IRCA in 1986, there were an estimated 3.2 million undocumented immigrants residing in the United States. Despite the

statute's existence, that figure nearly doubled in the next ten years, as a reported 5 million undocumented immigrants were in the country by 1996.

Today, the undocumented immigrant population living in the U.S. has surged to between 9.3 million and 20 million, of which an estimated 9 million arrived after 1990. More remarkable is that as many as three million enter the country each year. Passel, *Estimating the Number of Undocumented Aliens*, in EMPLOYMENT AND EARNINGS, 333 (1986).

The IRCA's criminalization of the hiring of undocumented workers, has not prevented of up to 15 million unauthorized immigrant currently employed in the U.S. Studies performed by the Office of Immigration Statistics revealed that between 1986 and 2001 the number of criminal or administrative investigations and general inspections against worksite violations declined by 80%. Furthermore, although the number of arrests of employers in violation of the IRCA reached 17,654 in 1997, only 445 such arrests were made in 2003.

Criminal enforcement by deportation is not a viable solution. The sheer size of this now permanent component of the American population renders deportation an untenable solution, although the idea continues to resurface among conservative legislators. Today deportation would cost more than $200 billion over five years, more than double the annual budget of the entire department of Homeland Security (to which the Immigration and Naturalization Department has been amalgamated). A year ago, George Will, Op. Ed.,

The GOP's Border Guard, Wash. Post, Oct. 9, 2005, at B7, stated:

> . . . it would take a lot of buses–200,000 of them, bumper to bumpers in a convoy 1,7– miles long to carry the undocumented immigrant population back to the American border. Americans will not do that–will not roundup and deposit the equivalent of the population of Ohio.

Although this Court in *Hoffman*, made a clear definition of the IRCA precluding any employment, or actions for employment benefits by unauthorized aliens, anywhere in the U.S., the lower courts since *Hoffman*, by use of the denounced "terms and sentences", have completely undermined the decision, and each state has gone its own way, whether agreeing with exclusive federal regulation of Immigration, or not.

In the present political climate, all attempts to date by Congress to clarify or modify the IRCA have failed. The recent dispute between the House of Representatives and the Senate over the conflicting immigration plans seems designed to delay the resolution of the illegal immigration questions. Given the depth of congressional neglect on these issue, and substantial interference by members of Congress with attempts to enforce existing immigration laws, it is clear *Congress has no clear policy* concerning immigration issues, leaving the IRCA unchanged.

Congress *is still trying however.* A news release of the Department of Homeland Security, dated May 17, 2007, announced:

> Today administration officials and a bipartisan group of Senators reached agreement on comprehensive immigration reform Legislation, providing *inter alia*, for no amnesty, but illegal immigrants who come out of the shadow will be given probationary status. To maintain their probationary status, they must pass a background check, remain employed, and maintain a clean criminal record. Those who fulfill their probations requirement can apply for a "Z" card which will enable them to live, work and travel freely. Z card holders will be required to pay a $1000 fine, meet accelerated English and Civic requirements, remain employed and renew their visa every four years. They will have an opportunity to apply for a green card, but only by paying an additional $4000 fine, applying at the back of the line and waiting until current backlog is cleared, returning to their home country to fulfill their green care applications etc, and demonstrating merit under the merit based system, emphasizing assimilation by requiring ability to speak English, level of schooling including added points for training in science, math and technology, have job offer in a high demand field, and work experience in the U.S. with "employer endorsement".

Yet, to be viable even if passed, that revision requires strict enforcement of the present IRCA as

interpreted in *Hoffman*. The likelihood is that court assistance, under the present confused disarrayed lower court decisions will not happen.

Even recently, on August 31, 2007, the United States District Court for the Northern District of California issued a temporary restraining order in *AFL-CIO et al. v. Chertoff, Secretary of DIIS, et al.*, N.D. Cal. Case No 07-CV-44472 CRB, against the DHS and Social Security, enjoining those agencies from implementing the final rule entitled "Safe Harbor Procedures for Employers Who Receive a No[-Match Letter."

While Congress wrestles the immigration problem, which is primarily caused by the State and Local Government singular enactments, and the lower courts' support of them, all almost repealing the IRCA as interpreted in *Hoffman*, the influx of unauthorized alien, entries to the United States, continues, as many as three million a year.

The failure of Congress, combined with the lower courts' protection of State and Local Government interference with uniform regulation of immigration by Congress, has raised the "specter" of a permanent class of undocumented aliens, with their civil rights determined by the happenstance of which state they reside in–a "shadow population", against which this Court warned even prior to the enactment of the IRCA in 1986. *Plyler v. Doe*, 457 U.S. 202, 210 (1981).[7]

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[7] As stated in *Plyler v. Doe*, 457 U.S. 202 (1981), 24 years before IRCA, ". . . whether due to 'sheer incapacity' or 'lax

The Z card congressional proposal seems to confirm the creation of the spector class of permanent residents with some but not all rights of citizens. Of course the current primary political debate revealed New York's proposal to grant drivers licences to unauthorized aliens.

CONCLUSION

Whether due to congressional failure to enact clarification, or the lower Courts erosion of the IRCA, the important need for resolution of the questions, can only be made by a clear decision of this Court, completely and totally eliminating lower courts' defiance of the *Hoffman* decision, and establishing *Hoffman* as the only central uniformity compliance provision prohibiting lower court interference. This result will force Congress to modify or change the IRCA in a manner that may be uniformly enforced throughout the U.S. The urgent need of such a clarifying decision by this Court cannot be overstated. The issue has reached crises proportion. Something must be done immediately. Millions of lives and state and local governments are dependent thereon to solve recurrent every day problems, both socially and economically.

The rulings of the Superior Court as presented in this Petition for Certiorari, purporting to give preeminence of the laws of California enacted in direct defiance of the IRCA and *Hoffman*, not only violate the

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enforcement'. . . a 'shadow population' of illegal migrants . . . millions. . . . within our borders."

Supremacy Clause, but present clearly, the problems requiring immediate clarification by this Court.

For all the foregoing reasons, Petitioners request this Petition for Certiorari granted with reversal and appropriate relief from the Judgment of the California Superior Court, as prayed in the Opening Brief.

Respectfully submitted,

Ralph E. McCarthy
283 Heather Court, 8A
Templeton, CA 93465
(805) 434-9905

Attorney for Petitioners

December 3, 2007

APPENDIX

APPENDIX A

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA
APPELLATE DIVISION

Case No.: CIV 239129

[Filed April 10, 2007]

FRANCISCA ORTEGA RODRIGUEZ Plaintiff/Respondent, vs. JAVIER A. LUNA, and ROSE MARIA GARCIA LUNA Defendant/Appellant.	)

OPINION AND JUDGMENT

Appellants, Javier A. Luna and Rosa Maria Garcia Luna (hereinafter collectively "Luna"), have appealed a judgment after trial by jury. The appellants contend that the trial court committed reversible error in denying their motion concerning the respondent's immigration status. The appellants assert that the respondent was an illegal alien. The appellants also argue that the respondent's status as an alleged illegal alien constituted a defense to the respondent's action.

Statement of Facts

Respondent, Francis Ortega Rodriguez (hereinafter "Rodriguez"), provided services to the Lunas as a preparer of menudo, a Mexican specialty dish. A dispute existed as to whether or not Rodriguez was an employee or an independent contractor. Rodriguez filed a complaint before the Labor Commissioner. The Labor Commissioner ruled in favor of Rodriguez. The appellant's appealed the Labor Commissioner ruling to the Superior Court.

The appellants assert that the respondent was in this country illegally.[1] The appellants contend that the respondent did not have standing to bring her action because of her alleged illegal status. The appellants also contend that by utilizing the respondent's services they could potentially have some criminal exposure.

In response to discovery propounded by the respondent, the appellants asserted their Fifth Amendment privilege against self incrimination. The respondent filed a discovery motion to challenge the appellants' use of the Fifth Amendment defense. The trial court did not accept the argument that the assertion of the Fifth Amendment was proper. In particular, the trial court concluded that the appellant had waived this privilege when they testified before the Labor Commissioner. Additionally, the trial court concluded that to the extent that the Fifth Amendment

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[1] The only information this appellate court has about the subject of the respondent's alleged illegal status is contained in the briefs on appeal and two offers of proof made to the trial court.

privilege applied, its assertion required that the respondent not be prejudiced by the appellants' utilization of the privilege against self incrimination.

The appellants assert three bases for reversal. Each issue shall be examined separately.

State Court Subject Matter

The appellants contend that the Labor Commissioner and the trial court lacked jurisdiction to address the respondent's action because the Immigration, Reform and Control Act ("IRCA") deprived the Labor Commissioner and the state court of jurisdiction. This court expresses no opinion regarding the scope of IRCA. Instead, this court focuses on the manner in which the appellants sought to address the question of jurisdiction.

The ruling with which the appellants take issue was a decision on a discovery motion. Several problems are presented by the strategy employed by the appellants. First, the appellants sought to contest jurisdiction in the context of a discovery motion. The appropriate way to contest jurisdiction is to file a demurrer, motion to dismiss, motion for summary judgment or writ. Other procedural avenues are available and this list is not meant to be exhaustive.

Second and even more importantly for purposes of this appeal, the motion ruled upon by the trial court has not been included in the record on appeal. This court cannot determine if the trial court has made an error if the motion, which was the subject of the alleged erroneous ruling, was not included in the

record on appeal. It is the appellants' duty to insure that the documents upon which the rely are included in the court record. *Erichon v. Sullivan* (1947) 81 C.A.2d 790, 791.

> A judgment on appeal is presumed correct until the contrary is proved. "A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." *Denham* v. *Superior Court* (1970) 57 Cal.2d 557, 564 citing Witkin and cases.

The only document in the record on appeal related to the discovery motion is the ruling on the motion. The ruling without the underlying motion is an insufficient record for the appellants to meet their burden on appeal. "It incumbent on the appellant to make it affirmatively appear that error was committed by the court below." *Cockrill* v. *Clyma* (1893) 98 Cal. 123, 126.

Trial Court Lacked Jurisdiction To Award Sums Not Presented To The Labor Commissioner

The appellants contend that the trial court committed error by allegedly considering issues not presented to the Labor Commissioner. In order for the appellants to prevail on appeal of this subject they must: 1) designate a record which identifies the issues

considered by the Labor Commissioner; and (2) identify documents in the record that establishes that the trial court considered topics in excess of those addressed by the Labor Commissioner.

The record is silent regarding any ruling made by the Labor Commissioner. Therefore, the appellants cannot establish that the trial court considered issues other than those presented to the Labor Commissioner. Accordingly, the appellants have again failed to meet their burden on appeal.

Sanctions Violated Constitution

This issue touches on many of the subjects addressed in the ICRA discussion cited above. The appellants assert that the trial court made a ruling that compromised their Fifth Amendment privilege against self incrimination. In essence, the appellants contend that the trial court issued an order on a discovery motion that was not supported by the facts of the motion. The obligation of an appellate court is to review a record and determine if the rulings of the trial court are supported by the evidence.

Since the appellants have not included the discovery motion, which is the subject matter of the order that they have appealed, this court does not have ability to determine if the trial court abused its discretion or issued an order in excess of its authority. Once again, the appellants have failed to meet their burden on appeal.

Accordingly, the judgment of the trial court is affirmed.

DATED: April 10, 2007

/s/
KENT M. KELLEGREW
Judge of the Superior Court
Appellate Division

/s/
BARRY B. KLOPFER
Presiding Judge of the Superior Court
Appellate Division

/s/
TARI L. CODY
Judge of the Superior Court
Appellate Division

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF VENTURA

CASE NO. CIV 239129

[Dated September 1, 2006]

FRANCISCA ORTEGA RODRIGUEZ)
Plaintiff/Respondent,)
)
vs.)
)
JAVIER A. LUNA, and ROSE MARIA)
GARCIA LUNA,)
dba Restaurant Hermanos Garcia)
Defendant/Appellants.)
)

JUDGMENT ON JURY VERDICT

This cause came on regularly for trial on August 28, 2006, in Department 40 of the above-entitled court, the Honorable Vincent J. O'Neill, Judge, presiding. Plaintiff appeared personally and through by her attorneys, Richard L. Francis, Esq., and Charles W. Oaks, Esq. of the Law Offices of Richard L. Francis & Associates, P.C. Defendants appeared personally and through their attorney Ralph E. McCarthy.

A jury of 12 persons and one alternate was regularly impaneled and sworn to try the action. After hearing the evidence, arguments of counsel, and instructions of the Court, the matter was referred to the jury on August 31, 2006.

The jury deliberated and returned the general verdict which stated that the jury found in favor of Plaintiff FRANCISCA ORTEGA RODRIGUEZ and against Defendants JAVIER A. LUNA and ROSA MARIA GARCIA LUNA, dba Restaurant Hermanos Garcia, and awarded damages in the amount of Twenty Four Thousand Three Hundred Twenty-Seven Dollars and Nineteen Cents ($24,327.19).

Based on said jury verdict, Plaintiff FRANCISCA ORTEGA RODRIGUEZ is entitled to judgment in her favor in said amount, plus statutory costs properly claimed.

NOW, THEREPORE, IT IS ADJUDGED, ORDERED AND DECREED that judgment be entered in favor of Plaintiff FRANCISCA ORTEGA RODRIGUEZ and against Defendants JAVIER A. LUNA and ROSA MARIA GARCIA LUNA, dba Restaurant Hermanos Garcia, in the amount of Twenty Four Thousand Three Hundred Twenty-Seven Dollars and Nineteen Cents ($24,327.19), plus statutory costs properly claimed.

The foregoing is the JUDGMENT of the Court.

September 1, 2006.

/s/
Vincent J. O'Neill,
Judge of the Superior Court

APPENDIX C

BEFORE THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA

Case No. 13-35695

[Excerpts from Order, Decision or Award of the Labor Commissioner]

[Dated: January 30, 2006]

FRANCISCA ORTEGA RODRIGUEZ	)
	)
Plaintiff,	)
	)
vs.	)
	)
JAVIER LUNA, ROSA MARIA GARCIA LUNA[1], individual and jointly dba RESTAURANT HERMANOS GARCIA	)
	)
Defendant,	)

ORDER, DECISION, OR AWARD

[1] Named incompletely in the Complaint as Rosa Luna when the complete name is Rosa Maria Garcia Luna.

OF THE LABOR COMMISSIONER
BACKGROUND

The Plaintiff filed an initial claim with the Labor Commissioner's office on September 19, 2005. The Complaint raises the following allegations:

1. That the Plaintiff is due $17,276.25 in regular and overtime-premium wages earned during the period from September 15, 2002 to September 26, 2004 (hereinafter "claim period.")

2. That the Plaintiff is entitled to recover waiting time penalties, pursuant to Labor Code 203.

A hearing was conducted in Santa Barbara, California on November 29, 2005, before the undersigned-hearing officer designated by the Labor Commissioner to hear this matter. The Plaintiff appeared in person and Charles W. Oaks, Attorney At Law, represented her. Both Defendants appeared in pro per and an Answer to the Complaint was submitted into evidence in this proceeding. Carmen Garibay testified as a witness in this proceeding.

Due consideration having been given to the testimony, documentary evidence, and arguments presented, the Labor Commissioner hereby adopts the following Order, Decision or Award.

FINDINGS OF FACT

At the outset of the proceeding, the Plaintiff made an inquiry as to whether or not the correct Defendant had been named in the Complaint, as the Plaintiff

asserted that Alberto Garcia might also be a legal owner of the business. Alberto Garcia, who was present at the beginning of the proceeding as an observer, is the brother of Rosa Maria Garcia Luna. Javier Luna and Rosa Maria Garcia Luna, a husband and wife, testified that they are the legal owners of the business in question and that Alberto Garcia is an owner of the real estate property where the business is located but he is not an owner of the business. The Plaintiff concurred with this assessment, as she had no evidence in this proceeding to establish otherwise. Therefore, Alberto Garcia was not named as a co-Defendant in this matter, he was excused from the hearing room as a potential witness and the hearing proceeded against Javier and Rosa Maria Garcia Luna, as named.

Javier Luna and Rosa Maria Garcia Luna, (hereinafter collectively "Defendant"), jointly own and operate a Mexican food restaurant located in Oxnard, CA with table seating for forty-five to fifty (45 to 50) patrons. The restaurant is open to the public seven (7) days per week. The nature of the relationship between the parties is a disputed matter in this proceeding. According to the Plaintiff, she worked as an employee of the Defendant. According to the Defendant, the Plaintiff was never an employee, rather she was always an independent contractor. The parties stipulated that the period of their relationship ran from April 12, 2002 to September 26, 2004, at which time the Defendant terminated the Plaintiff's relationship. The parties also stipulated that the Plaintiff's compensation plan was set out by the Defendant as a fixed salary payable to her on Friday of each week. The Plaintiff testified that her salary rate

ranged from $225.00, to $250.00 and up to $275.00 on a weekly basis. The Plaintiff testified that she received the $275.00 salary amount for a nine (9) week period in 2003 when Mr. Luna took a vacation to Mexico and to Washington State and she had to assume his duties and, as a result, she worked additional weekly hours. The Plaintiff testified that $225.00 per week was paid to her at the beginning of her employment and $250.00 per week was paid to her at the end of the employment and that her weekly rate changed from $225.00 to $250.00 sometime in 2003. The parties stipulated that the Defendant paid the Plaintiff's compensation in the form of cash pay and without issuing any itemized wage statements. The Plaintiff testified that when she was discharged, the Defendant paid her all of the final week's salary, including payment for Saturday and Sunday.

With regard to her duties, the Plaintiff testified that she cooked, cleaned, washed dishes and performed waitress duties, all performed under the direction and control of the Defendant.

It is the Plaintiff's position in her claim that she regularly worked over eight (8) hours daily and/or over forty (40) hours weekly and that the Defendant has failed to pay her for all of her regular and overtime hours worked as she was paid on the basis of her fixed salary only, regardless of the amount of hours actually worked. The Plaintiff testified that the Defendant did not maintain any time records of the actual hours that she worked and she has reconstructed the hours worked in her claim from memory as her schedule remained consistent throughout the employment period.

The Plaintiff offered into evidence a spreadsheet wherein she computed her claim amounts along with a declaration she prepared about her hours worked and wages paid. The Plaintiff offered into evidence several pictures taken at the restaurant that allegedly depicted her working in the business during the claim period.

The Defendant asserted that none of the Plaintiff's claims are valid and no wages or compensation is due to the Plaintiff whatsoever. In its Answer, the Defendant wrote, "We further state that we have never used the services of employees since the place is big enough for the family members only. Francisca was contracted to prepare what she does

* * *

[page 8]

The regular rate of pay is a rate per hour. More particularly, it is the hourly wage that the employee is deemed to earn for each hour of straight-time (*i.e.*, non-overtime work. The courts have held that a salary cannot be based on more than the legal maximum hours of forty (40) per week (*Skyline Homes v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239). In the case of a non-exempt employee who is paid a salary, all hours over the legal maximum regular hours in any one workweek or in any one workday must be compensated by full payment of the applicable overtime rates.

With regard to the amount of the Plaintiff's overtime claim, it is notable that the Defendant submitted absolutely no time or payroll records to the

hearing officer in defense. The Plaintiff's evidence was credible and convincing to establish that she worked the regular and overtime hours as claimed, with minor exceptions only, and that the Defendant has failed to pay all of her earned wages correctly.

As a result, the Plaintiff is entitled to recover $16,049.90 in regular and overtime wages, computed as follows: A) in the claim period from September 22, 2002 to January 31, 2004, seventy-one (71) weeks worked less five (5) weeks deducted for the Defendant's vacation[2] leaves sixty-six (66) weeks worked multiplied by $126.00[3] in underpaid wages each week equals $8,316.00; B) in the claim period from February 1, 2004 to September 25, 2004, thirty-four (34) weeks worked multiplied by $195.50[4] in underpaid wages each week equals $6,647.00; and, C) in the 2003 year, five (5) weeks of vacation taken by the Defendant, therefore, five (5) weeks multiplied by $217.38[5] in underpaid wages each week equals $1,086.90.

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[2] The evidence established that the Defendant took five (5) weeks of vacation leave in 2003 only.

[3] $351.00 earned for working forty (40) hours at straight time plus eight (8) hours at time and one-half less $225.00 paid.

[4] $445.50 earned for working forty (40) hours at straight time plus twelve (12) hours at time and one-half plus four (4) hours at double-time less $250.00 paid.

[5] $462.38 earned for working forty (40) hours at straight time plus nineteen (19) hours at time and one-half less $275.00 paid.

* * *

[page 10]

these wages remain unpaid over sixteen (16) months after they were due. Under these circumstances, the Defendant's failure to pay the wages found due to the Plaintiff in this proceeding is held to be willful and waiting time penalties are appropriate to be assessed in this matter, computed for the maximum of thirty (30) days.

CONCLUSION

For all of the reasons set forth above, IT IS HEREBY ORDERED that:

1. The Plaintiff recover $16,049.90 in regular and overtime wages.

2. Interest in the amount of $2,159.04 has accrued on the unpaid wages, pursuant to Labor Code § 98.1 (c).

3. The Plaintiff recover $1,923.90 in waiting time penalties, pursuant to Labor Code § 203, computed at $64.13 per day[6] for thirty (30)days.

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[6] Daily rate for waiting time penalty computed using Plaintiff's average nine (9) hour workday; therefore, eight (8) hours due at $6.75 per hour regular rate and one (1) hour due at $10.125 per hour time and one-half rate.

/s/
Paul S. Rodriguez, Hearing Officer

Dated: January 30, 2006

APPENDIX D

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA
APPELLATE DIVISION

Case No.: CIV 239129

[Filed June 27, 2007]

FRANCISCA ORTEGA RODRIGUEZ Plaintiff/Appellant, vs. JAVIER LUNA, and ROSE MARIA GARCIA LUNA Defendant/Respondent.	)

ORDER DENYING REHEARING

Appellant's petition for rehearing is DENIED.

/s/
BARRY B. KLOPFER
Presiding Judge of the Ventura Superior Court
Appellate Division

/s/

KENT M. KELLEGREW
Judge of the Appellate Division
Ventura Superior Court

APPENDIX E

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

2d Civil No. B202032
(Super. Ct. No. CIV 239129)
(Ventura County)

[Filed September 20, 2007]

JAVIER LUNA, et al.,
Petitioners,

v.

THE SUPERIOR COURT OF VENTURA COUNTY,
Respondent;

FRANCISCA ORTEGA RODRIGUEZ,
Real Party in Interest.

ORDER

THE COURT:

The petition for a writ of certiorari or prohibition transferred to this court on September 4, 2007, by the

California Supreme Court is denied. A petition raising identical issues was considered on the merits and denied on July 27, 2007, in *Luna, et. al. v. Superior Court*, Case No. B200596. (See *Hagan v. Superior Court* (1962) 57 Cal.2d 767, 771 [repetitious applications for extraordinary relief may be denied by the court of appeal].)

APPENDIX F

IN THE SUPREME COURT OF CALIFORNIA

No. S155754

[Filed September 4, 2007]

JAVIER LUNA, et al.,
Petitioners,

v.

THE SUPERIOR COURT OF VENTURA COUNTY,
Respondent;

FRANCISCA ORTEGA RODRIGUEZ,
Real Party in Interest.

The above entitled matter is transferred to the Court of Appeal, Second Appellate District, Division Six for consideration in light of *Hagan v. Superior Court* (1962) 57 Cal.2d 767. In the event the Court of Appeal determines that this petition is substantially identical to a prior petition, the repetitious petition must be denied.

/s/GEORGE
Chief Justice

APPENDIX G

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 6

DATE: July 27, 2007
[Filed August 10, 2007]

Superior Court County of Ventura
800 S. Victoria Ave.
Ventura, CA 93009

LUNA, JAVIER
Petitioners

v.

VENTURA CO. SUPERIOR COURT
Respondent

RODRIGUEZ, FRANCISCA ORTEGA
Real Party in Interest.

THE COURT:

The petition for writ of Review, etc., is denied.

APPENDIX H

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA

MINUTE ORDER

Date: 10/17/2007 Time: 08:20:00 AM Dept: 40
Judicial Officer Presiding: Judge Vincent O'Neill
Clerk: Julie Childs

Reporter: Joan Kiddie

Case Title: FRANCISCA ORTEGA RODRIGUEZ VS JAVIER A LUNA

Case No: CIV239129

Case Category: Civil - Limited Case Type: Judicial Review - Other

---

Event Type: Motion for Attorney Fees (CLM)

Moving Party: FRANCISCA ORTEGA RODRIGUEZ

Causal Document & Date Filed: Motion for Attorney Fees, 08/20/2007

Appearances:

RALPH E. MCCARTHY is present for JAVIER A LUNA
RALPH E. MCCARTHY is present for ROSA MARIA GARCIA LUNA
RICHARD FRANCIS, is present on behalf of Francisca Ortega Rodriguez

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At 8:39 a.m., court convenes in this matter

The Court having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Court finds/orders:

Motion for Attorney's Fees by Francisca Ortega Rodriguez is GRANTED in the amount of $10,000 plus $358.50 costs.

The formal order was signed this date.

The court denies Mr. McCarthy's request for Stay of this order pending U.S. Supreme Court appeal.

APPENDIX I

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

CASE NO. CIV 239129

[Dated December 6, 2006]

FRANCISCA ORTEGA RODRIGUEZ Plaintiff, vs. JAVIER A. LUNA, and ROSE MARIA GARCIA LUNA, individually and jointly dba Restaurant Hermanos Garcia Defendant.	)

[~~PROPOSED~~] ORDER

Honorable Vincent J. O'Neill
Date: November 30, 2006
Time: 8:30 a.m.
Ctrm: 40

GOOD CAUSE appearing, based on the motion heard, argued and ruled upon on November 30, 2006, at or

about 8:30 a.m. in Department "40" of this court, the court now issues the following order:

1. The motion of Plaintiff, FRANCISCA ORTEGA RODRIGUEZ, For Attorneys Fees against Defendants JAVIER A. LUNA and ROSA MARIA GARCIA LUNA, dba Restaurant Hermanos Garcia, is granted.

2. Defendants JAVIER A. LUNA and ROSA MARIA GARCIA LUNA, dba Restaurant Hermanos Garcia are ordered to pay attorneys fees, joint and severally, in the amount of $27,927.00 to Law Offices of Richard L. Francis & Associates, P.C., counsel for Plaintiff, FRANCISCA ORTEGA RODRIGUEZ.

IT IS SO ORDERED

DATED: 12-6-06

/s/ _____
Honorable Vincent J. O'Neill
Judge of the Superior Court

APPENDIX J

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

CASE NO. CIV 239129

[Dated August 28, 2006]

FRANCISCA ORTEGA RODRIGUEZ Plaintiff	)
vs.	)
JAVIER LUNA; ROSE MARIA GARCIA LUNA,, individually and jointly dba RESTAURANT HERMANOS GARGIA Defendants	)

DEFENDANTS MOTION IN LIMINE FOR DECLARATION PLAINTIFF IS AN 'UNAUTHORIZED ALIEN' AND NO COURT HAS SUBJECT JURISDICTION OVER HER CLAIM FOR 'BACK PAY' WAGES; FOR EXCLUSION OF EVIDENCE; JUDGMENT DECLARING LABOR COMMISSION PROCEEDING VOID, AND PLAINTIFF'S CLAIMS DISMISSED WITH PREJUDICE FOR DISCHARGE OF UNDERTAKING,; ATTORNEY FEES AND COSTS; POINTS AND AUTHORITIES.

Trial Date: August 28, 2006
Time: 1:30 P.M.
Ctrm: 40

SUMMARY OF MOTION

On July 17, 2006 Defendants filed their MOTION IN LIMINE, on the same grounds, which was denied on August 11, without prejudice to renew to the trial judge at the time of trial. Defendants seek relief as stated in the caption above.

On September 19, 2005, pursuant to Labor Code Sections 98 *et seg* Plaintiff Francisca Ortega Rodrigues filed her intial wage claim with the Labor Commissioner, alleging she as'due $17,276.25 in regular and overtime -premium wages earned during the period for September 15, 2002 to September 26, 2004 the commission determined she was ro recover $16,049.90 computed as (A) in the claim period from September 22, 2002 to January 31, 2004, 71 weeks with deductions for a total of $16,049.90, from Feb 1, 2004 to September 24, 2004 $6,647.00 unpaid wages,

and the 2003 year five (5) weeks of vacation for $1,086.90, and that she was discharged on September 26, 2004.

While it would appear all of her claim for wages before September 25, 2005 are barred by the Statute of Limitations, the point is moot for defendants allege she was not entitled to any wages at all, for she was never an employee, but her relationship with defendants was that of 'independent contractor', and not an employee, and that she is and was and "unauthorized alien" (illegal immigratnt) who is barred under the Immigration and Naturalization Act from bringing any suit to collect ' back pay' wages.

The Court, last week entered it "exclusionary sanction" prohibiting the defendants from testifying in this matter. The Court has indicated it will consider pre-trial motions at 1;30 P.M. on the 28th, and not commence picking a jury untial Tuesday morning. Defendants have therefore filed this Motion, and a requested instructions re an illegal immigrants lack of a right to sue, and burden of proof requiring plaintiff to proceed first with proof she is a lawful employee and was such at the time of the claim herein. etc, Defendants request a bifurc ation pre jury session with testimony of Plaintiff limited strictly to her immigration status, which defendants claim is a jurisdictional issue pre requisite to proceeding in this Court, since it determine the subject matter jurisdiction herein. In the alternative defendant request Plaintiff be restrained from producing any evidence in this matter, and likewise retrained from introducing any evidence whatever of the Labor Commission Proceedings, documentrary, findings

judgment and award, exhibits, or any evidence whatsover from that Commission proceeding. If the Court denies the last request, and Plaintiffs are allowed to an do introduce or refer to in opening statement any of the Labor Commission evidence or documents as delineated above in any way what ever, the the Court then lift its order precluding Defendants from testifying in rebuttal to such remarks or evidence. To do otherwise would deprive defendants of due process of law under both federal and states constitutions, even if the order prohibiting them from testifying did not otherwise violate due process.

POINTS AND AUTHORITIES

A. **Plaintiff, as an "unauthorized alien", so defined in the Immigration Act,** is **Barred from Asserting her "back pay" claims in all Courts, State and Federal.**

The ***Immigration Reform and Control Act of 1986, (IRCA), Title 8 1101 et seg.,*** provides it is unlawful to hire or continue to employ an alien the employer knows to be an "unauthorized alien, defined as 'one who is not lawfully admitted for permanent residence, or authorized to be so employed by federal immigration and nationality laws or by the United States.' *8 U. S. C. Sec. 1324a(a)(1)(A), (a)(2),(h)(3).* The California court in *Del Taco v. Workers Compensation Appeals Board and Jorge Guiterrez, 79 CA4th* 1437 (2d Dist,Div. Six, (2005), (Yegan , J with Gilbert, P.J., and Coffee, J, concurring, referred in a foot note, Page 3, FN2.."We use the phrase"illegal worker" to mean a person working in California who is not lawfully residing in the United States of America"; noting "it is

a federal crime for an alien to enter the United States of America without permission of the federal government." Defendants likewise will use the phrase "illegal worker" herein to include "Unauthorized alien " as defined in the IRCA. *supra.* use the phrase , and in Requested Jury Instructions with the Courts permission.

The central issue on this motion is the complete bar of the Plaintiffs claims An illegal worker making an oral 'back pay claim, is completely and totally barred in all Courts, federal and state. In response, contends her immigration status may not be revealed or inquired into relying on Cal. Labor Code Sections 1171.5 and 3351. Her contention misses the mark , for Labor Code Section 1171.5, while generally supporting her contention makes an important exception providing it is inapplicable, "where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is neceesary in order to comply with federal immigration law.". The issue thus presented was fully explained in *Farmer Brothers, supra*, where Justice Yegan noted, "the U.S. Supreme Court decision in (*Hoffman Plastic Compounds, Inc. v. NLRB, 535 US. 137, 149, 151, 122 S. Ct. 1272, 152 L.Ed.2d 271 (2002)*, held the IRCA prohibited awarding back pay to illegal aliens for unfair labor practice.." And that the California Legislature enacted Labor Code 1171.5 in response to *Hoffman*, (citing *Rivera v. Nibco, In., 364 F3d 1057,1073 (9thCir. 2004)*. The *Farmer* Court then explained:

> "Section 1171.5, subdivision (b) avoids conflict with *Hoffman's* back pay prohibition by making

an exception to the exclusion of evidence of the employees immigration status 'where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law', and by excluding any reinstatement remedy prohibited by federal law. Under existing law, back pay is not recoverable by an employee who would not be rehired regardless of any employer misconduct. *(Rivcom Corp. Agricultural Labor Relations Bd (1983) 34 Cal.3d 743, 773-774).* Thus , where reinstatement is prohibited by federal law, section 1171.5 would also prohibit back pay, which was the intent of the Legislature in passing section 1171.5 and related statutes." (See Sen.Com. On Labor and Industrial Relations rep.on Sen. Bill No. 1818, supra, as amended May 14, 2002; Civ Code 33399; Gov. Code Sec 7285)."

Of course IRCA, *(8 USC 1324 (a)(l)((b)*, makes it unlawful for a person or entity to hire for employment in the United States, an individual without complying with provisions requiring employment verification by observing an individuals United States passport, or a resident alien card, alien registration card, or other document designated by the Attorney General, .is evidence of authorization of employment in the United States., which is defined further as a document (social security account number care, etc. ", and importantly subsection (2) provide sit is unlawful for a person , after hiriing an alien for employment,... to continue to employ the alien knowing the alien is, or has become

an unauthorized alien with respect to such employment.

Plaintiff will, of course contend the present claim is for 'work actually performed" citing *Flores v. Alberton, Inc., (C. D. Cal. 2002)*, suggesting Hoffman did not hold undocumented employee was barred from recovering unpaid wages for work actually performed. The argument once more misses the mark. Hoffman is not so limit4ed, The argument is defeated by the underlying purpose of the backpay limitation, which is uniform whether the pay is work performed or not performed, the basic claim is pursuant to a contract of employment which must be a lawful contract, one in which the worker is lawfully entitled, 'qualified" to enter into. In short the claimant must be a qualified person, lawfully in the country at the time of his entry into an employment contract. Qualification for employment "is determined by whether the applicant was an alien authorized for employment in the United States at the time in question. *See eg. Egbuna v. Time-Life Libraries, Inc., 153 F. 3 184, 187 (4th Cir 1998)* and *Escobar v. Spartan Web. Serv. 281 F. Supp. 2d 895 (S. D. Tex. 2003)*. In *Escobar* the court held that the plaintiff was not entitled to back pay pay due to the fact he was an undocumented worker at the time of this employment., Similarly the court *Egbuna* held the remedies of are available only if the employee *demonstrates* the qualifications necessary for lawful employment. The *Escobar* decision was based directly upon the holding in Hoffman.

As shown, under IRCA it is unlawful for employers to employ unauthorized aliens., and that after hiring an alien, its unlawful to continue to employ the alien,

knowing he has become or is an unauthorized alien, , and provides for civil and cardinal penalties if an employer hires an unauthorized alien, or continues his employment with knowledge.

This was the basis of the fifth amendment objection taken by defendants in the recent depositions, for which they have been severely sanctioned. In short, any evidence tending to show knowledge by defendant of Plaintiff illegal worker status, could result in, or lead to conviction of the above criminal penalties.

Yet *Hoffman* holds 'back pay is not recoverable by an employee who would not be rehired, regardless of any employer misconduct." See *Farmer Bros Coffee, v. Workers Comp Appeal Bd, 133 Cal. App. 4th 533 (2dkDist 2005).*

Our division Six, Second District, California Court of appeals, in Del Taco v. Workers *Comp. Appeals Bd 79 CA4th 1437*, annulled an award of vocational rehabilitation benefits to an"illegal worker" in California. , Specifically the court held an injured employee even under worker com law, was not entitled to vocational rehabilitation benefits t where the employee was unable to return to work solely because of immigrations status. The court observed the compensation board had interpreted the Labor Code to provide and "illegal worker" with greater benefits than those available to a "legal worker, in violation of the equal protection clause of the United States Constitution. In that case the court noted the employer Del Taco was obeying the law by not retaining the worker after it was learned that he was not legally permitted to reside or work in the United States, and

at the same time violating federal law by remaining in the United States. S Once more the basic reasoning underlying Hoffman was affirmed. Likewise an award of back pay to an illegal worker, unqualified to work in the U.S. , whether performed or not requires conflrmance of a contract of employment illegal, and void at its inception. To reward the ;illegal worker back pay, vocational right etc, would bc directly contrary to the announced policy of the IRCA. The issue is whether he was lawfully employed, under an employment contract, on which to base any wage award. An illegal alien cannot be so employed, without violating the federal statutes .

B. Be All Evidence Derived from the Labor Commission hearing should be Excluded as Prejudicial in this *De Novo* Section 98.2 Trial. .

As developed in the prior motion in lumine reference was made to *Progressive Concrete, Inc., v. Ron Parker, (DCA 4th, Feb. 2006)* were the Court stated on appeal under *Labor Code Section 98.2,*:

" The timely filing of a notice of appeal forestalls the Commissioner's decision, terminates his or jurisdiction, and vest jurisdiction to conduct a hearing de novo in the appropriate court"..although denoted an 'appeal', unlike a conventional appeal in a civil action, the hearing by the trial court under the Labor Code is de novo. A hearing de novo under Labor Code section 98.2 literally means a new hearing..that is a new trial. The decision of the commissioner is entitled to no w4ight whatsoever, and the proceeding are truly 'a trial anew in the fullest sense.'... the Labor commission

order and findings are totally void and of no effect thereafter. Review is according to the facts presented to the superior court and not to the decision o f the commissioner

In addition, the Court has now excluded or prohibited any testimony by defendants. That , with the foregoing should justify excluding all documents, transcripts, findings, or any evidence from that hearing whatsoever, nor should anyone, including Plaintiff be permitted to testify thereto: all such evidence should be excluded in this trial *de novo*.

Conclusion

For all the foregoing reasons the Court should entered judgment for the Defendants voiding the Labor Commission Award., and an Order excluding all evidence of Plaintiff based on or derived from the Labor Commission hearing , and striking the Labor Board Award; for reasonable attorney fees to defendants, with discharge and release of their Bond and Undertaking.

August 26, 2006.

Respectfully submitted,

/s/
Ralph E. McCarthy

I certify that on August 28, 2006, prior to first call I handed this document to the trial department clerk, and likewise to the attorney for Plaintiff.

/s/
Ralph E. McCarthy

APPENDIX K

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

CASE NO. CIV 239129

[Filed August 28, 2006]

FRANCISCA ORTEGA RODRIGUEZ Plaintiff/Respondent, vs. JAVIER LUNA, and ROSE MARIA GARCIA LUNA Defendant/Appellants.	)

[PROPOSED] **DISCOVERY SANCTION ORDER**

Trial Date: August 28, 2006
Time: 1:30 am.
Ctrm: 40

The above-referenced matter having come on for hearing on the *ex parte* application of Plaintiff on August 22, 2006, the Honorable Vincent J. O'Neill, Judge, presiding; Plaintiff being represented by the Law Offices of Richard L. Francis & Associates, P.C., by Charles W. Oaks, Esq., and Richard L. Francis,

Esq. and Defendants being represented by Ralph E. McCarthy, Esq;

The Court, having read the moving and opposing papers, having heard the arguments of counsel, and having paid particular attention to the transcripts of the Court Ordered depositions of Defendants on August 18, 2006, and the Court being fully apprized in the premises hereby makes the following Findings, collectively and individually, and Orders:

vjo~~1)~~ ~~There is a strong suggestion that Defendants' Fifth Amendment assertions during their depositions were not made in good faith, and the Court so finds.~~

~~2)~~ 1) The Fifth Amendment Privilege, which could be reasonably asserted in this case has been waived by testimony before the Labor Commissioner and by documents already on file in this case, or filed with the Labor Commissioner

~~3)~~ 2) To the extent the Fifth Amendment privilege is nonetheless applicable in this case, its assertion requires that Plaintiff not be prejudiced in these proceedings.

Accordingly, It is ORDERED:

Defendants shall be precluded from offering either oral or documentary evidence that could have been provided at their deposition, but for their assertion of the Fifth Amendment privilege.

Further, Defendants, and their attorney, Ralph E. McCarthy are jointly and severally Ordered to pay to the Plaintiff and her attorneys of Record, the Law Offices of Richard L. Francis & Associates, the reasonable costs of having had to bring the instant motion, in the amount of Six Thousand Three Hundred Sixty-Five Dollars ($6,365) in sanctions for abuse of discovery. Said amount shall be payable on or before September 11, 2006.

IT IS SO ORDERED.

August 28, 2006

/s/
Vincent J. O'Neill,
Judge of the Superior Court

APPENDIX L

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
COUNTY OF VENTURA

No. (Superior Court NO. CIV 239129)

[Excerpts from Hearing, Dated August 28, 2006, Pages 11 to 19]

FRANCISCA ORTEGA RODRIGUEZ Plaintiff-Respondent,	)
vs.	)
JAVIER A. LUNA, and ROSE MARIA GARCIA LUNA Defendants-Appellants	)

APPEAL FROM
THE SUPERIOR COURT OF
VENTURA COUNTY

HONORABLE VINCENT J. O'NEILL, JUDGE

REPORTER'S TRANSCRIPT ON APPEAL

APPEARANCES:

For Plaintiff-Respondent:

RICHARD FRANCIS & ASSOCIATES
BY: RICHARD L. FRANCIS
CHARLES OAKS
Attorneys at Law
711 South A Street
Oxnard CA 93030

For Defendants-Appellants:

RALPH E. McCARTHY
Attorney at Law
283 Heather Court, 8A
Templeton CA 93465

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Reported by: DENISE A. POTTS, CSR 3869
Certified Shorthand Reporters

* * *

[page 11, line 22]

THE COURT: Then we have the dueling motions here to exclude immigration status. And, on the other hand, Mr. McCarthy is once again arguing that the matter should be dismissed in his favor because of immigration status. And my tentative, though, would be in favor of the plaintiff on both aspects of the issue.

So, Mr. McCarthy, if you want to be heard

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further, make a record, you may. I think that counsel have correctly argued that you' re misusing back pay in your argument in a situation where the work has been done and the money therefore earned is not the same back pay as referred in the case law which turns on immigration status.

MR. McCARTHY: I would point out, your Honor, that in my memorandum on the point, I cited cases subsequent to Hoffman, which dealt with the issue of an alleged difference between treatment of wage claims for work already performed in contradistinction to work that had not been performed.

And the cases go into -- in two cases I cited there discusses this specific issue and then goes back to the basic proposition in Hoffman, which is that no matter how you cut it, there is no way to make a party, a person who is, in fact, an unauthorized alien or, as they say in Farmers, they call it an illegal worker.

There is no way on earth that the Court can create jurisdiction to allow that person to proceed in a court at all. A necessary prerequisite to seeking an action under Hoffman, whether before the Labor commission, whether common law action, whether any other cause of action, is based on the theory of an employee, illegal or not, that employee must show that there was a lawful employment contract. A contract of hire, whether it be oral or implied or otherwise, there is an absolute requirement to show a contract for hire on such a claim.

And the courts in these cases simply point

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out there is no way on earth that an illegal immigrant can be a lawful party to a contract for hire in the United States because to so allow it would allow a complete defeat and undermining of the federal legislation regulating immigrant employment in the United States.

Before I leave that, I also asked in the alternative for a motion excluding evidence of the Labor Commission hearing on that same motion.

THE COURT: We'll get to that. You are referring now to the federal cases Fourth Circuit and Southern District of Texas that you cited on page 5 of your motion?

MR. MCCARTHY: Yes, your Honor. I might indicate to the court that I got those cases from the appellate brief in the Albertson's case which is presently pending on certiorari before the United States Supreme Court.

The brief for the appellant outlined this exact point, cited those cases for distinguishing it, and brought out the point that it hasn't got anything to do with it, whether it is for work performed or work to be performed doesn't make an iota of difference.

That distinction cannot somehow confer legal status on an illegal immigrant to enter into contracts in the United States or to bring action on any of those

contracts in the United States. In other words, the issue is shifted over off the point of whether it's before or after and instead placed on whether or not they had any way at all that you can make an illegal immigrant's contract lawfully enforceable in any court in the United States, and

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both held they did not. And that's the argument.

I will candidly admit that I was unable to find that it has progressed in the United States Supreme Count beyond what I got on the web was the appellate brief on that cert. And the question they are seemingly refuting is the exact issue here of an alleged distinction in the law dependent upon whether or not future or past work performed. And they held that that's essentially irrelevant.

The basic question of the immigration statute is illegal immigrants are not permitted to be lawfully employed in the United States under any circumstances without getting the permission of the Immigration Department. That's what the federal statutes say and that's also what Farmers says, distinguishes the 1171.5 California presumptions of an employee, not allowing you to bring in whether or not they're an immigrant, which, parenthetically, I would only point out that ruling was as to workman compensation cases, not as to 98.2 wage claims.

They distinguish 98.2 wage claims as a different animal. The former being for injuries, the latter being for wages. And they said as to wages, any state action

allowing such an action would be in direct contradiction of the Immigration and Naturalization Act and defeats entirely the purpose of the United States Congress. Rest.

THE COURT: We could debate where the fault lies, whether it's the employer or the court or the legislature

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in California for writing the Labor Code the way they have. But you're supposed to attach copies of federal cases, according to the Rules of Court, so you haven't and, therefore, I haven't read them yet. I'll take a look at them and make sure, but what type of proceeding was underlying these federal cases?

MR. McCARTHY: This was a case, I believe -- heavens, I looked at the caption on the web in the U.S Supreme Court. I think there was some defendant stores, Albertson's being the lead, and I think the issue involved was whether or not they were entitled to compensation for work not performed under the -- I believe it was under the Federal Employment Opportunities Act.

And the tentative holding -- or the District Court had held that they were permitted to -- in other words, the FEOA, or whatever it was, was exceptions from the restriction of Hoffman, and so it went up on appeal , it went through the Ninth Circuit, and the best I can tell some 52 different parties are briefing that appeal before the U.S. Supreme Court on that issue.

THE COURT: That's the Albertson's case, you mean?

MR. McCARTHY: Yes.

THE COURT: But I'm asking the cases you're citing, what type of proceeding was involved there?

MR. McCARTHY: Well, the first case, as I indicated, in the brief, was a straight ruling that an illegal immigrant cannot bring a back pay claim in the United States, citing Hoffman. The second one went further and

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said that the employee has the burden of proving, he must -- I think they used the word demonstrate that he is lawfully employed in the United States before bringing any such action, putting the burden of proof on there. Again citing Hoffman. And there must be a thousand cases citing Hoffman. But for that precedent.

And I might indicate, especially in view of the national climate with reference to immigration and border patrol at the present time, and particularly in California, that the resolution of this issue by this Court, if found to be in conflict with the United States Congress action and the Immigration Act, necessarily forces these little defendants to go through the appeal all the way on up depending on what the ruling is in Albertson's.

My guess is that -- and I think even the Albertson' s defendants pretty well concede, that an

illegal immigrant cannot enter into a valid contract of hire in the United States. He must prove there is, as a condition of that contract, that he can be lawfully employed in the United States and he has the burden of it. And, of course, this is what Albertson's and all the food markets and many other people throughout the United States are arguing before the Supreme Court right now. And I presume that's why the Supreme Court's got the issue up before it.

THE COURT: Well, I can certainly see a distinction between trying to enforce a contract, even an employment contract on the one hand, and taking advantage of the labor statute in California on the other, which is what this case

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is.

But any comments at this point, Mr. Oaks?

MR. OAKS: Precisely, this is a statutory issue of overtime and minimum wage. I think that, you know, the Albertson's cases he's referring to, I haven't seen it, but I think he said it's not decided and so it's not even a case. I think he also said it has to do with work not performed. And there's a difference between having a law that tells an employer that he has to hire somebody that he knows would violate versus collecting unpaid wages for labor that he benefited from in allowing him protection from unjust enrichment from hiring people and using law to prevent from paying. And certainly did have an history of the same sort of thing which we passed a number of

amendments that prevented hiring people without paying them and controlling them.

And that's -- there is a number of cases, federal and state, that talks about what happens if you do allow employers to hire people who are not here legally to escape that. And that's not what the Congress intended and that's not what Hoffman says. They're all about damages that go for work not performed and I don't think there is any case here that the defendants have cited for their own benefit that say this is about work that has been performed.

MR. MCCARTHY: One last comment, if it please the Court, simply that it seems to me for such a motion to lie before this Court, the defendants or somebody must be

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implying that the plaintiff is a illegal immigrant, an unauthorized person; otherwise, the entire motion of exclusion would be irrelevant and moot, and I would ask if the Court make this dismissal order, that it make a finding based on the actions of counsel, if nothing else , that, indeed, at least for the purposes of this motion, the Court is assuming that the plaintiff is an illegal immigrant and that the defendants -- or the plaintiff has not offered any evidence to the contrary.

In short, there would be no need for exclusion or hiding the immigration status if she was legally in the United States. There would be no point in it. The only reason for seeking an exclusion has to be based on the theory that she's an illegal immigrant. Otherwise, it's

irrelevant. And to raise this constitutional question on that basis, I submit, should require at least an implied finding by the court that she is, in fact, an illegal immigrant.

THE COURT: Well, first of all, I don't intend to violate the Labor Code and inquire into something I'm not supposed to inquire. And , secondly, you're the one that's been saying for weeks that she is and you want a factual hearing to make sure or else you will prove it up some other way. So you're the one that injected the issue in the case.

MR. McCARTHY: I suggest the United States Supreme Court did in Hoffman, your Honor.

THE COURT: All right. well, the defense motion to

[page 19]

dismiss or to have a hearing on immigration status potentially leading to dismissal is denied, subject to me taking a look at the cases I haven't read yet just to make sure. And plaintiff's motion to exclude any reference to immigration status of the plaintiff is granted.

Any further clarification needed on that?

MR. OAKS: No, your Honor.

THE COURT: Any further record of issue, Mr. McCarthy?

MR. McCARTHY: I think the record is adequate, your Honor.

* * *

APPENDIX M

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
COUNTY OF VENTURA

No. (Superior Court NO. CIV 239129)

[Excerpts from Hearing, Dated August 28, 2006, Page 18, line 19 - Page 19, line 11]

FRANCISCA ORTEGA RODRIGUEZ Plaintiff-Respondent,	)
vs.	)
JAVIER A. LUNA, and ROSE MARIA GARCIA LUNA Defendant-Appellants.	)

* * *

[page 18, line 19]

THE COURT: Well, first of all, I don't intend to violate the Labor Code and inquire into something I'm not supposed to inquire. And, secondly, you're the one that's been saying for weeks that she is and you want a factual hearing to make sure or else you will prove it up some other way. So you're the one that injected the issue in the case.

MR. McCARTHY: I suggest the United States Supreme Court did in Hoffman, your Honor.

THE COURT: All right. Well, the defense motion to

[page 19]

dismiss or to have a hearing on immigration status potentially leading to dismissal is denied, subject to me taking a look at the cases I haven't read yet just to make sure. And plaintiff's motion to exclude any reference to immigration status of the plaintiff is granted.

Any further clarification needed on that?

MR. OAKS: No, your Honor.

THE COURT: Any further record of issue, Mr. McCarthy?

MR. McCARTHY: I think the record is adequate, your Honor.

* * *

APPENDIX N

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
COUNTY OF VENTURA

No. (Superior Court NO. CIV 239129)

[Excerpts from Hearing, Dated August 28, 2006, Pages 68 (lines 4-18) and 129]

FRANCISCA ORTEGA RODRIGUEZ)
Plaintiff-Respondent,)
)
vs.)
)
JAVIER A. LUNA, and ROSE MARIA)
GARCIA LUNA)
Defendant-Appellants.)

* * *

[page 68, line 4]

MR. McCARTHY: May it be deemed that by way of offer of proof out of the hearing of the jury that I offered to prove that through the testimony of the plaintiff and through a representative from the Department of Immigration that, indeed, the plaintiff, Francisca, is an unlawful immigrant, unauthorized person within the meaning of the immigration laws, and that I further would then offer to prove by

reference to law and fact that she is prohibited from entering into any contract of hire within the United States while that continues.

And I understand the Court's ruling is against me on it, but I want to make sure the record shows that's the case.

THE COURT: Very well. That's correct. No change in yesterday's rulings.

* * *

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THE COURT: Anything else?

MR. McCARTHY: Well, just the offer of proof that I mentioned before. Unless it can be deemed that I have made an offer of proof to prove that she is an illegal immigrant and it's been denied by the court under the prior order. I just want the record to show that I did offer to prove that as a fact and the court has rejected that offer. And I want to preserve the issue, your Honor. That's the whole purpose of it.

THE COURT: I think it's well-preserved. That's the second time you've said this, so it's well-preserved. I think it's already on the record that you wanted the opportunity to prove that up and the defense said they don't concede it, but don't feel that it's admissible and I agree. I'm sorry. Did I say plaintiff? Now, you've got me doing it.

MR. FRANCIS: Your Honor, the plaintiff did have a concern regarding the redaction issue of Exhibit 1.

We do believe that the prejudice having to do with the unrelated materials raise the requirement that they stay intact, but the admission of the defendants as to the employment, the termination, contained in that declaration I think are highly relevant and necessary in this case.

MR. McCARTHY: I certainly object to, for the record, to that. Editing a declaration to state only the remarks that with reference to the admission that he claims and exclude all the contentions to the contrary materially affects that evidence.

* * *

APPENDIX O

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
COUNTY OF VENTURA

No. CIV 239129

[Excerpts from Reporter's Transcript of Proceedings, Tuesday August 22, 2005, Page 9]

FRANCISCA ORTEGA RODRIGUEZ Plaintiff, vs. JAVIER A. LUNA, and ROSE MARIA GARCIA LUNA, individually and jointly dba Restaurant Hermanos Garcia, Defendant.	)

HONORABLE VINCENT J. O'NEILL, JUDGE

REPORTER' S TRANSCRIPT OF PROCEEDINGS

Tuesday, August 22, 2005

APPEARANCES:

For Plaintiff: CHARLES OAKS
RICHARD L. FRANCIS
Attorneys at Law

For Defendants: RALPH E. McCARTHY
Attorney at Law

Reported by: DENISE A. POTTS, CSR 3869
Certified Shorthand Reporters

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basing the order so there is appropriate record for appeal.

THE COURT: All right. Well, I Will do that.

I find based on the papers, including the transcript submitted, that there is a strong suggestion there that the Fifth Amendment was not asserted in good faith because of the whole tenor of the handling of the depositions by Mr. McCarthy and also because it was not in any way directed at or limited to the types of questions that there could be a good faith view that there's a Fifth Amendment privilege.

Secondly, it seems to me that there was no Fifth Amendment privilege, is no Fifth Amendment privilege here, because it's already been waived by testimony at the labor commission hearing and apparently in other documents, declarations that have been filed.

Thirdly, if there is any Fifth Amendment privilege that's applicable, that would not preclude a consequence for asserting it in this case and that consequence is going to be suppression of the defendants' testimony in any and all phases, including rebuttal, at the trial.

And, in other words, the defense will be not allowed to call them as witnesses for any reason.

MR. McCARTHY: I assume that applies to the plaintiffs will likewise not be allowed to call.

THE COURT: No, it doesn't. The law will apply appropriately. They're not the ones being sanctioned, so to the extent that they want to make further record or

* * *